

NAVIGABLE WATERS RULES ANNOTATED

The navigable waters rules that have been adopted by the Natural Resources Commission are set forth here and are accompanied by annotations to assist with understanding of application and interpretation. The annotations are summaries taken from a variety of sources. In some instances, the annotations are interpretations of a particular rule section, but in other instances they reflect interpretations of navigable waters law with general application. The reader is cautioned that the annotations are *unofficial*, and may suggestion directions for additional research, but cannot be cited as precedent.

ARTICLE 6. NAVIGABLE WATERS

Rule 1. Applicability

312 IAC 6-1-1 Application of article

Authority: IC 14-10-2-4; IC 14-29-1-8

Affected: IC 14-19-1-1; IC 14-21-1; IC 14-28-1; IC 14-29-1; IC 14-29-3; IC 14-29-4-5; IC 14-34; IC 14-37

Sec. 1. (a) This article governs an activity relative to a license, and an activity for which a license is required whether or not a permit is sought or held, under IC 14-19-1-1, IC 14-29-1, IC 14-29-3, IC 14-29-4 (if IC 14-29-4-5(2) applies), or another statute administered by the department as a result of a waterway being navigable.

(b) In the absence of a contrary state boundary, the line of demarcation for a navigable waterway is the ordinary high watermark.

(c) A separate license is not required under this article and IC 14-29-1 for an activity permitted under IC 14-21-1, IC 14-28-1, IC 14-29-3, IC 14-34, or IC 14-37.

(d) Compliance with this article satisfies the licensing requirements for IC 14-29-1, IC 14-29-3, and IC 14-29-4 (if IC 14-29-4-5(2) applies).

(e) Before issuing a license under IC 14-21-1, IC 14-28-1, IC 14-34, or IC 14-37, the department shall apply the requirements of IC 14-29-1-8 and this article with respect to an activity within a navigable waterway.

(f) Before issuing a license under this rule, the department shall consider the following:

(1) The public trust doctrine.

(2) The likely impact upon the applicant and other affected persons, including the accretion or erosion of sand or sediments.

(g) A separate license is not required under IC 14-29-1-8 for an activity which is exempted from licensing by IC 14-29-1-8(e).

Annotation: This section was recodified on September 11, 1997 from language originally codified in 1991 at 310 IAC 21-1-1 but amended several times subsequently.

Application Generally

A landmark decision in Indiana with respect to determining and applying navigability is *State v. Kivett*, 228 Ind. 629, 95 N.E.2d 148 (1950). The Indiana Supreme Court determined the test for navigability is whether a waterway "was available and susceptible for navigation according to the general rules of river transportation at the time [1816] Indiana was admitted to the Union. It does not depend on whether it is now navigable.... The true test seems to be the capacity of the stream, rather than the manner or extent of use. And the mere fact that the presence of sandbars or driftwood or stone, or other objects, which at times render the stream unfit for transportation, does not destroy its actual capacity and susceptibility for that use."

Once a waterway is found to be navigable it remains so, even if the waterway is no longer used for purposes of commercial navigation. *United States v. United States Steel Corporation*, 482 F.2d 439 (7th Cir. 1973).

For navigable waters, the Department of Natural Resources is not only the regulator but also the proprietor. Title to the bed of a navigable water is owned by the State of Indiana. Citing *State v. Kivett*, 228 Ind. 629, 95 N.E.2d 148 (1950). The state agency assigned "general charge" of navigable waters is the DNR. Citing IC 14-19-1-1(9). The line of demarcation for a navigable waterway is its ordinary high watermark. Citing 312 IAC 6-1-1(b). The key permitting section of the Navigable Waterways Act is typically IC 14-29-1-8. Section 8(c) anticipates the issuance of a permit for an activity which will not do any of the following: (1) Unreasonably impair the navigability of the waterway. (2) Cause significant harm to the environment. (3) Pose an unreasonable hazard to life or property. *Hoosier Environmental Council v. RDI/Caesar's Riverboat Casino, LLC and DNR*, 8 Caddnar 48 (1998).

"Navigable" Defined

"Navigable" is defined in 312 IAC 1-1-24 to mean a waterway that has been declared to be navigable or a public highway by one or more of the following: (1) A court. (2) The Indiana General Assembly. (3) The United States Army Corps of Engineers. (4) The Federal Energy Regulatory Commission. (5) A board of county commissioners under IC 14-29-1-2. (6) The Natural Resources Commission under IC 4-21.5.

To assist in the administration of 312 IAC, the Natural Resources Commission has adopted as a nonrule policy document its "Roster of Indiana Waterways Declared Navigable" at 15 IND. REG. 2385. 312 IAC 1-1-24(b).

Navigable Servitude

Navigability for purposes of imposing the navigable servitude is not coterminous with navigability for exercise of the regulatory power or exercise of admiralty jurisdiction. In 1974, the DNR issued a permit to dredge a channel to the Great Miami River, a navigable waterway, without conditioning approval upon dedication to public use of the resulting new waters. In 1977, the DNR reaffirmed the permit without new conditions, as well as the permittee's authority to connect the channel to a lagoon. As a result, the DNR could not in 1994 interfere with the permittee's private use of the channel and lagoon unless the DNR also exercised the power of eminent domain. *I-275 Enterprises, Inc. v. Department of Natural Resources*, Marion Circuit Court, 49 D05-9409-CP-0982 (1996), reversing 6 Caddnar 172 (1994).

Ordinary High Watermark

Congress, in 1953, enacted the Submerged Lands Act, whereby the federal government quit-claimed title to all lands beneath navigable waters within state boundaries to the various states, reserving in the federal government authority over such lands and waters for the purposes of navigation. See 43 U.S.C. Section 1301 *et seq.*, especially 43 U.S.C., Section 1311 and 1312. By virtue of 43 U.S.C., Section 1301 (a) the State of Indiana acquired title up to the ordinary high water mark. *Garn v. City of Michigan City*, 453 F. Supp. 33, 35 (N.D. Ind. 1978).

In the absence of a contrary state boundary, the appropriate line of demarcation for a navigable waterway is the ordinary high watermark. The Indiana Water Resource, Governor's Water Resource Study Commission, State of Indiana (Indiana Department of Natural Resources, 1980), page 107.

"Ordinary high watermark" is defined in 312 IAC 1-1-26 to mean (1) The line on the shore of a waterway established by the fluctuations of water and indicated by physical characteristics. Examples of these physical characteristics include the following: (A) A clear and natural line impressed on the bank. (B) Shelving. (C) Changes in character of the soil. (D) the destruction of terrestrial vegetation. (E) The presence of litter or debris. (2) Notwithstanding subdivision (1), the shore of Lake Michigan at 581.5 feet I.G.L.D., 1985 (582.252 feet N.G.V.D., 1929).

The definition of "ordinary high watermark" was codified in 1993 at 310 IAC 21 to be "consistent with the U.S. Army Corps definition."

The definition was also made "consistent with one recently enacted by the Indiana General Assembly in 1993 S.E.A. 179. The definition is critical because it delineates the geographic extremity of jurisdiction over navigable waters." In addition, a finite elevation was set as the "ordinary high watermark" for Lake Michigan. Again, the elevation was "consistent with what has been set by the U.S. Army Corps." Report of Public Hearing and Recommendation for Final Adoption of Amendments to the Navigable Waters Article (310 IAC 21), LSA Document #93-106(F) (Sep. 3, 1993).

The state of Indiana has title to the lands located within the boundaries of the state and beneath Lake Michigan, a navigable waterway, up to the ordinary high watermark of Lake Michigan. *Ogden Dunes v. DNR, Beverly Shores and NIPSCO*, 4 Caddnar 31 (1987).

The line of demarcation for a navigable waterway is its "ordinary high watermark." Citing 312 IAC 6-1-1(b). *Save Our Rivers v. RDI/Caesar's Riverboat Casino, LLC and DNR*, 8 Caddnar 26 (1998).

Public trust doctrine

The state holds the bed of Lake Michigan in trust for the people as the common property. All citizens may benefit from this property so long as none attempt to deprive others of the same benefits. The state is authorized to regulate the removal of sand from Lake Michigan because the submerged lands of the lake are held in trust by the state. *Lake Sand Co. v. State*, 68 Ind. App. 439, 120 N.E. 715, 715-16 (1918) cited with approval in *Garner v. Michigan City*, 453 F.Supp. 33, 35 (N.D. Ind. 1978).

"Although the Indiana courts do not expressly use the term 'public trust doctrine', the courts' language imposes a trust obligation on the state to hold the waters and submerged lands of Lake Michigan in trust for the public's use and enjoyment. Indiana case law expressly states that the waters and submerged lands of Lake Michigan are held in trust for the people of the state, and the state is without power to convey or curtail the right of its people in these coastal resources." Note, *Indiana's Lake Michigan Shoreline: Recommended Shoreland Regulations for a Valuable Natural Resource*, 25 VAL. UNIV. LAW REV. 99, 107.

Historically, the public trust doctrine has been closely associated with the state sovereign ownership doctrine. The latter doctrine holds that when states achieve sovereignty, one consequence is immediate state ownership of certain lands and waters. When Indiana achieved statehood in 1816, it obtained title to its navigable waters. At the core of the public trust doctrine is the fiduciary obligation of the state to hold state sovereign resources for the benefit of the general public. State sovereign ownership and the public trust doctrine are based on the need to preserve for the public the use of navigable waters free from private interruption and encroachment. *Lauder and Starke Co. Comn. v. DNR*, 7 Caddnar 180 (1997).

Placement of the seawall along a shoreline harmonious with adjoining seawalls does not typically infringe upon public trust waters. Although the legal shoreline of a navigable waterway may shift with accretion or erosion due to natural conditions, accretion or erosion attributable in part to man-made structures does not generally result in a change to the legal shoreline. *Id.*

The public trust doctrine is not an absolute. An exception to the restriction on alienation of public trust lands is provided where there is a public purpose or benefit. Examples of valid alienations may include wharves, piers, docks and other structures in aid of commerce. *Id.*

The placement of fill within the public trust lands of Lake Michigan requires a permit pursuant to IC 14-18-6 and payment to the treasurer of state of \$100 before a land patent is issued to the private landowner. Another illustration of requiring compensation for the private acquisition of public trust lands is offered by Ohio. That state provides by rule for a schedule of "lease" payments as determined on an individual site and use basis for fills within Lake Erie. Fills placed before 1989 (and not subject to the terms of a site-specific lease) are assessed at \$0.01 per square foot, annually, with an escalator based upon the National Consumers Price Index. *Id.*

Historically, the public trust doctrine in natural resources law has been closely associated with the state sovereign ownership doctrine. The latter doctrine holds that when states achieve sovereignty, one consequence is immediate state ownership of certain lands and waters. When Indiana achieved statehood in 1816, it obtained title to its navigable waters.

At the core of the public trust doctrine is the fiduciary obligation of the state to hold state sovereign resources for the benefit of the general public. State sovereign ownership and the public trust doctrine are "founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment." Citing *Phillips Petroleum*

Company v. Mississippi, 484 U.S. 469, 488 (1988). *Snyder v. Department of Natural Resources*, 8 Caddnar 41 (1998).

While the DNR's authority under the public trust doctrine is clear, the authority must be exercised in a reasonable manner after a careful examination of the facts peculiar to a particular case. An extension proposed to a boathouse located on a manmade channel off the main body of an inland lake (Lake Wawasee), where the channel is not well-suited to navigation because a nearby seawall already inhibits usage for that purpose, and where the extension would be cantilevered so as not to preclude public fishing, does not violate the public trust doctrine. *Id.*

Because public freshwater lakes have similar legal stature to navigable waterways, there is a broad public right to the waters of a public freshwater lake. In order to fill a portion of a public freshwater lake, "very special circumstances" must be present. *Maloney v. DNR*, 6 Caddnar 7 (1990).

An addition to the rules governing navigable waters made during recodification in 1997 specifically acknowledged application of the "public trust doctrine" to activities within navigable waters. The acknowledgment was balanced in the rule by a reflection upon the property rights of a permit applicant and the neighbors of an applicant. Minutes of the Natural Resources Commission (June 26 and June 27, 1997) accessible at <http://www.ai.org/nrc/mi062697.htm/>

Standing

Where as with navigable waters, its regulatory authority is based upon environmental considerations, the Commission has either assumed or viewed liberally the standing of citizens to participate in adjudicatory processes. *Hoosier Environmental Council v. RDI/Caesar's Riverboat Casino, LLC and DNR*, 8 Caddnar 48 (1998).

Subject-Matter Jurisdiction

The owner of a land upon which there is located a nonnavigable lake owns and has the right to control the surface of the lake. *Berger Farms, Inc. v. Estes*, Ind. App., 662 N.E.2d 654.

Where the DNR fails to demonstrate Millers Lake in Noble County is either a public freshwater lake or a navigable waterway, the department lacks subject-matter jurisdiction to regulate construction activities by a riparian owner. *Waikel v. DNR*, 6 Caddnar 43 (1992).

The Navigable Waterways Act (IC 14-29-1) prescribes construction that will "[c]ause significant harm to the environment." Citing IC 14-29-1-8(c)(2). Water quality is relevant to whether these values are properly protected. Water quality is a consideration that cannot be divorced from the responsibilities of the Department of Natural Resources under the Navigable Waterways Act. On the other hand, the DNR has subject-matter jurisdiction to consider water quality solely within the context of the Navigable Waters Act and not within the broader context of the regulatory authority of the Indiana Department of Environmental Management. *Hoosier Environmental Council v. RDI/Caesar's Riverboat Casino, LLC and DNR*, 8 Caddnar 48 (1998).

The Department of Natural Resources is the state agency that has "general charge of the navigable water of Indiana." The DNR is also the state agency primarily responsible for boating safety. As a result, the DNR may properly consider the consequences to environmental resources and to public safety for activities within a navigable waterway. The agency may condition or deny a permit for the construction of a permanent facility, a consequence of which could be to enable vessel traffic to cause significant harm to the environment or threaten public safety. The DNR, and the Natural Resources Commission on administrative review, have jurisdiction to make reasonable inquiry into the likely environmental consequences of a riverboat to be operated from facilities authorized by a permit. Testimony of this nature is relevant to determining whether the erection of a permanent structure within the ordinary high watermark of the Ohio River (a navigable waterway) would cause significant harm to the environment in contravention of IC 14-29-1-8. *Id.*

312 IAC 6-1-2 Transfer of license

Authority: IC 14-10-2-4; IC 14-29-1-8
Affected: IC 14

Sec. 2. (a) A person cannot transfer or assign a license issued under this article unless prior written approval for the transfer or assignment is obtained from the director.

(b) The director shall not unreasonably deny a request to transfer or assign a permit issued under this article.

Annotation: This section was recodified on September 11, 1997 from language originally codified in 1991 at 310 IAC 21-1-3.

312 IAC 6-1-3 License application; limitations; revocation; general sanctions

Authority: IC 14-10-2-4; IC 14-29-1-8
Affected: IC 4-21.5; IC 14-9-3; IC 14-10-2-6; IC 14-29

Sec. 3. (a) A license issued under this article is subject to the conditions, terms, or limitations contained on or attached to the license.

(b) A license may be suspended or revoked by the department under IC 4-21.5 for a violation of IC 14-29, this article, or a condition contained on or attached to the license.

(c) Any deputy director referenced in IC 14-9-3 may file a complaint with the commission that seeks the issuance of a notice of violation and the imposition of a charge, where authorized by IC 14-10-2-6, for any of the following:

(1) A violation of IC 14-29.

(2) A violation of this article.

(3) A violation of a condition contained on or attached to a license issued under this article.

(4) Conduct of an activity for which a license is required under this article but for which no license is obtained.

(d) The issuance of a license under this article does not divest the United States, Indiana, the department, or a riparian or littoral owner of a proprietary interest in a navigable waterway or adjacent lands.

Annotation: This section was recodified on September 11, 1997 from language originally codified in 1991 at 310 IAC 21-1-4.

License Conditions, Terms, and Limitations

In determining whether to grant a license to place boat slips in a navigable waterway (Trail Creek in LaPorte County), the DNR may consider whether the boat slips would impede navigation or pose a risk to life or property. If navigation would remain unimpeded under the terms of the license, and there also is no showing of risk to life or property, no basis is established for denial of the license. *Michigan City Historical Society v. DNR and Francik*, 5 Caddnar 169 (1990).

Rule 2. Definitions

312 IAC 6-2-1 Applicability

Authority: IC 14-10-2-4; IC 14-29-1-8
Affected: IC 14

Sec. 1. (a) The definitions contained in this rule apply throughout this article.

(b) The definitions contained in 312 IAC 1 also apply.

Annotation: This section was recodified on September 11, 1997 from language originally codified in 1991 at 310 IAC 21-2-1.

312 IAC 6-2-2 "Abandoned shipwreck" defined

Authority: IC 14-10-2-4; IC 14-21-1-31; IC 14-29-1-8
Affected: IC 14

Sec.2. "Abandoned shipwreck" means a shipwreck to which title has been given up by the owner with the intent of never claiming a right or interest in the future. An intention to give up title may be demonstrated where an owner:

- (1) takes steps to collect insurance or pay a salvage award to a person who salvages the vessel's cargo; or
- (2) takes no action after a wreck incident to recovering or removing the vessel and its cargo.

Annotation: This section was recodified on September 11, 1997 from language originally codified in 1991 at 310 IAC 21-2-2.

"Abandoned shipwreck means any shipwreck to which title voluntarily has been given up by the owner with the intent of never claiming a right or interest in the future and without vesting ownership in any other person. By not taking any action after a wreck incident either to mark and subsequently remove the wrecked vessel and its cargo or to provide legal notice of abandonment to the U.S. Coast Guard and the U.S. Army Corps of Engineers, as is required under provisions in the Rivers and Harbors Act (33 U.S.C. 409), an owner shows intent to give up title. Such shipwrecks ordinarily are treated as being abandoned after the expiration of 30 days from sinking.

"(a) When the owner of a sunken vessel is paid the full value of the vessel (such as receiving payment from an insurance underwriter) the shipwreck is not considered to be abandoned. In such cases, title to the wrecked vessel is passed to the party who paid the owner.

"(b) Although a sunken warship or other vessel entitled to sovereign immunity often appears to have been abandoned by the flag nation, regardless of its location, it remains the property of the nation to which it belonged at the time of sinking unless that nation has taken formal action to abandon it or to transfer title to another party. Any cargo aboard a vessel entitled to sovereign immunity also generally remains the property of the flag nation. In such a situation, title to the cargo remains in the nation from which it had been captured. Shipwrecks entitled to sovereign immunity are wrecks of warships and other vessels (such as privately owned vessels chartered or otherwise appropriated by a sovereign nation for military purposes) used only on government non-commercial service at the time of sinking. Examples of vessels entitled to sovereign immunity would include, but not be limited to, U.S. battleships and German U-boats from World War II, Confederate gunboats and Union ironclads from the Civil War, and British frigates and Colonial privateers from the Revolutionary War." Abandoned Shipwreck Guidelines, Department of the Interior, 55 Fed. REG. 50116, 50120 (Dec. 4, 1990).

312 IAC 6-2-3 "Beach nourishment" defined

Authority: IC 14-10-2-4; IC 14-29-1-8

Affected: IC 14

Sec. 3. "Beach nourishment" means the placement of sand to mitigate beach erosion:

- (1) within the ordinary high watermark of Lake Michigan; or
- (2) within such proximity to the shoreline of Lake Michigan that wind or water erosion is likely to transport sand into the lake.

Annotation: This section was codified September 11, 1997. A general permit or authorization for the placement of "beach nourishment" was implemented by emergency rule on April 15, 1996 and expired on April 14, 1997. The emergency rule contained a definition for "beach nourishment" very similar to the one set forth here. The text of the emergency rule was published at 19 IND. REG. 2316 (June 1, 1996).

"'Beach nourishment' is the placement of sand or other suitable materials to replenish natural processes for beach maintenance along Indiana's Lake Michigan shoreline. Where natural processes have been interrupted, typically by the placement of man-made structures such as seawalls or breakwaters, beach nourishment can mitigate or eliminate erosion." Report of Public Hearing, Analysis and Recommendation for Final Adoption, Recodification of the Rules Governing Navigable Waters, LSA #97-56(F) (June 9, 1997).

Rival lakeside communities, both within proximity to a sand dredging operation by a utility company, have standing to seek administrative review of a permit authorizing redeposit of the sand for beach nourishment. *Ogden Dunes v. DNR, Beverly Shores and NIPSCO*, 4 Caddnar 31 (1987).

Where a DNR permit to a utility for the excavation (and redeposit) of sand from the bed of Lake Michigan has expired, both in terms of its duration and as to the amount of sand authorized to be excavated, issues arising from beneficial use of the sand for beach nourishment are generally mooted. *Id.*

312 IAC 6-2-4 "Historic shipwreck" defined

Authority: IC 14-10-2-4; IC 14-21-1-31; IC 14-29-1-8

Affected: IC 14

Sec. 4. "Historic shipwreck" means a shipwreck that is located within a historic site.

Annotation: This section was recodified on September 11, 1997 from language originally codified in 1991 at 310 IAC 21-2-6.

"Historic shipwreck means a shipwreck that is listed on or eligible for listing in the National Register of Historic Places." Abandoned Shipwreck Guidelines, Department of the Interior, 55 FED. REG. 50116, 50121 (Dec. 4, 1990).

312 IAC 6-2-5 "Historic site" defined

Authority: IC 14-10-2-4; IC 14-21-1-31; IC 14-29-1-8

Affected: IC 14-8-2-125

Sec. 5. "Historic site" has the meaning set forth in IC 14-8-2-125.

Annotation: This section was recodified on September 11, 1997 from language originally codified in 1991 at 310 IAC 21-2-7.

As defined in IC 14-8-2-125, "historic site" means "a site that is important to the general, archeological, agricultural, economic, social, political, architectural, industrial, or cultural history of Indiana. The term includes adjacent property that is necessary for the preservation or restoration of the site." P.L.1-1995, SEC. 1.

312 IAC 6-2-6 "Marina" defined

Authority: IC 14-10-2-4; IC 14-29-1-8

Affected: IC 14

Sec. 6. "Marina" means a structure that:

- (1) can service simultaneously at least five (5) watercraft; and
- (2) provides, for a fee, one (1) or more of the following:
 - (A) Watercraft engine fuel.
 - (B) Docks.
 - (C) Watercraft repair.
 - (D) Watercraft sales or rental.

Annotation: This section was recodified on September 11, 1997 from language originally codified in 1991 at 310 IAC 21-1-1.

312 IAC 6-2-7 "Public or municipal water utility" defined

Authority: IC 14-10-2-4; IC 14-29-1-8

Affected: IC 8-1-2-1; IC 14

Sec. 7. "Public or municipal water utility" means a "public utility" under IC 8-1-2-1(a) or a "municipally owned utility" under IC 8-1-2-1(h), which is operated to furnish water.

Annotation: This section was recodified on September 11, 1997 from language originally codified in 1991 at 310 IAC 21-2-10.

"Public utility" is defined by IC 8-1-2-1(a) to mean "every corporation, company, partnership, limited liability company, individual, association of individuals, their lessees, trustees, or receivers appointed by a court, that may own, operate, manage, or control any plant or equipment within the state for the:

- (1) conveyance of telegraph or telephone messages;
- (2) production, transmission, delivery, or furnishing of heat, light, water, or power; or
- (3) collection, treatment, purification, and disposal in a sanitary manner of liquid and solid waste, sewage, night soil, and industrial waste.

The term does not include a municipality that may acquire, own, or operate any of the foregoing facilities."

"Municipally owned utility" is defined by IC 8-1-2-1(h) to mean "every utility owned or operated by a municipality." As provided in IC 8-1-2-1(c), "municipality" means any city or town of Indiana.

312 IAC 6-2-8 "Shipwreck" defined

Authority: IC 14-10-2-4; IC 14-21-1-31; IC 14-29-1-8

Affected: IC 14

Sec. 8. (a) "Shipwreck" means a vessel or wreck, its cargo, and other contents.

(b) As used in subsection (a), a "vessel or wreck" includes each of the following:

- (1) Hull.
- (2) Rigging.
- (3) Armaments.
- (4) Apparel.
- (5) Tackle.
- (6) Cargo.
- (7) Other contents of the watercraft.

Annotation: This section was recodified on September 11, 1997 from language originally codified in 1991 at 310 IAC 21-2-11.

"Shipwreck... means a vessel or wreck, its cargo, and other contents. The vessel or wreck may be intact or broken into pieces scattered on or embedded in the submerged lands or in coralline formations. A vessel or wreck includes, but is not limited to, its hull, apparel, armaments, cargo, and other contents. Isolated artifacts and materials not in association with a wrecked vessel, whether intact or broken and scattered or embedded, do not fit the definition of a shipwreck." Abandoned Shipwreck Guidelines, Department of the Interior, 55 FED. REG. 50116, 50121 (Dec. 4, 1990).

312 IAC 6-2-9 "Waterway" defined

Authority: IC 14-10-2-4; IC 14-29-1-8

Affected: IC 14

Sec. 9. "Waterway" means a:

- (1) river;
- (2) stream;
- (3) creek;
- (4) run;
- (5) channel;
- (6) ditch;
- (7) lake;
- (8) reservoir; or
- (9) embayment.

Annotation: This section was recodified on September 11, 1997 from language originally codified in 1991 at 310 IAC 21-2-12.

Rule 3. Shipwrecks and Other Historic Sites

312 IAC 6-3-1 Applicability

Authority: IC 14-10-2-4; IC 14-21-1-31; IC 14-29-1-8

Affected: IC 14-21-1

Sec. 1. (a) This rule establishes standards applicable to the issuance of licenses, license conditions, and the conduct of investigations and scientific investigations needed to satisfy IC 14-21-1 and IC 14-29-1-8 for an abandoned shipwreck or historic site located in whole or in part within a navigable waterway.

(b) In addition to the purposes described in subsection (a), this rule is intended to effectuate the Abandoned Shipwreck Act (43 U.S.C. 2101) in Indiana. To the extent not inconsistent with this article, the department may apply guidelines of the National Park Service, Department of Interior, published on December 4, 1990, at 55 FED. REG. 50116 through 55 FED. REG. 50145 in considering an activity that may affect an abandoned shipwreck.

Annotation: This section was recodified on September 11, 1997 from language originally codified in 1991 at 310 IAC 21-3-1.

312 IAC 6-3-2 Administration of shipwrecks through division of historic preservation

Authority: IC 14-10-2-4; IC 14-21-1-31; IC 14-29-1-8

Affected: IC 14

Sec. 2. (a) The division of historic preservation and archeology of the department shall conduct the technical and professional functions of the department under this rule with respect to a determination or regulation of a historic site (including an abandoned shipwreck located within an historic site).

(b) The director of the division of historic preservation and archeology may issue a license under this rule.

Annotation: This section was recodified on September 11, 1997 from language originally codified in 1991 at 310 IAC 21-3-2.

312 IAC 6-3-3 Licensing

Authority: IC 14-10-2-4; IC 14-21-1-31; IC 14-29-1-8

Affected: IC 14-21-1

Sec. 3. (a) No person may remove, disturb, salvage, or destroy an abandoned shipwreck or a historic site located in whole or in part within a navigable waterway except under a license issued under this rule.

(b) A license application, with respect to a historic site (including a shipwreck located at a historic site), must include a plan (as defined in 310 IAC 20-1-20) that is proposed by the applicant to satisfy 310 IAC 20. The applicant must also satisfy 310 IAC 19. Except as provided in section 4 of this rule, the application shall be filed with the department at least thirty (30) days before a licensed activity is scheduled to begin.

(c) A person who wishes to recover or salvage an abandoned shipwreck that is not believed to be located at a historic site shall file a notification with the department. The notification must:

(1) provide the location of the abandoned shipwreck; and

(2) identify how the application determined:

(A) the abandoned ship is not located at a historic site; and

(B) that the proposed activity:

(i) does not otherwise violate IC 14-29-1-8; or

(ii) is subject to the exclusive jurisdiction of a federal court or federal agency.

(d) A license issued under this rule may be revoked for a violation of IC 14-21-1, IC 14-29-1-8, this article, or a term of the license.

Annotation: This section was recodified on September 11, 1997 from language originally codified in 1991 at 310 IAC 21-3-3.

The scope of license review for navigable waters extends to matters of historic preservation and archeology. As provided in this rule, a person may not remove, disturb, salvage, or destroy an historic site which is located in whole or part within a navigable waterway except under a permit issued under the State Historic Preservation and Archeology Act. Citing also 310 IAC 21-3-2. *Save Our Rivers*

v. RDI/Caesar's Riverboat Casino, LLC and DNR, 8 Caddnar 26 (1998).

312 IAC 6-3-4 Emergency licenses

Authority: IC 14-21-1-31; IC 14-29-1-8

Affected: IC 4-21.5-4; IC 14

Sec. 4. (a) The department may, under IC 4-21.5-4, issue a license for a scientific investigation or for salvage of a historic site (including an abandoned shipwreck located at a historic site) if the director determines both of the following:

- (1) Imminent and irreparable damage or loss is likely to occur to the historic site due to natural or cultural causes.
- (2) Complete review of an application under this rule is impracticable.

(b) To the extent practicable, a license issued under this section shall meet the requirements of this rule.

(c) A permit cannot be issued under this section if its issuance would preclude the recovery of archeological, historical, or architectural information that forms the basis for site significance.

Annotation: This section was recodified on September 11, 1997 from language originally codified in 1991 at 310 IAC 21-3-4.

Rule 4. Marinas

312 IAC 6-4-1 Applicability

Authority: IC 14-10-2-4; IC 14-15-7-3; IC 14-29-1-8

Affected: IC 14-29-1

Sec. 1. (a) This rule establishes standards for the placement or maintenance of a marina along a navigable waterway.

(b) This rule is administered by the division of water and the division of law enforcement of the department.

Annotation: This section was recodified on September 11, 1997 from language originally codified in 1992 at 310 IAC 21-4-1.

"In 1992, the natural resources commission adopted rules to mandate the placement of a 'wastewater holding tank' on any new marina permitted along navigable waters (with corresponding rules applicable to public freshwater lakes and to reservoirs managed by the department of natural resources). Existing marinas were provided until January 1, 1996 to comply with the mandate. Permitting experience with the rules suggested some flexibility in the way collected sewage may be handled (notably, pumped out and trucked to a sewage collection facility if the trucks are properly licensed for transport of sewage). Also, experience by the Lake Michigan Coastal Coordination Program, as well as the Pumpout Program administered by the Indiana Department of Environmental Management, suggested a few minor changes to make the regulatory terms more easily understood. For these reasons, the spirit of prior language is maintained by some of the specifics reworked in what will become 312 IAC 6-4." Report of Public Hearing, Analysis and Recommendation for Final Adoption, Recodification of the Rules Governing Navigable Waters, LSA #97-56(F) (June 9, 1997).

312 IAC 6-4-2 Marina license

Authority: IC 14-10-2-4; IC 14-15-7-3; IC 14-29-1-8

Affected: IC 14-29-1-8

Sec. 2. (a) A written license is required from the department to place a new marina along a navigable waterway.

(b) A license issued under subsection (a) satisfies IC 14-29-1-8 and IC 14-15-7-3.

Annotation: This section was recodified on September 11, 1997 from language originally codified in 1992 at 310 IAC 21-4-2.

312 IAC 6-4-3 Sewage pumpout facilities for watercraft

Authority: IC 14-10-2-4; IC 14-15-7-3; IC 14-29-1-8

Affected: IC 14-29-1-8

Sec. 3. (a) No person shall operate a marina unless the person secures and maintains one (1) of the following:

- (1) A license under 327 IAC 3-2 for the construction and operation of a wastewater treatment facility or sanitary sewer.
- (2) A license under 410 IAC 6-10 for the construction of a commercial on-site wastewater disposal facility.
- (3) An alternative written approval for wastewater disposal from an authorized governmental agency.

(b) The department shall require compliance with subsection (a) as a condition for the issuance of a license under section 2 of this rule.

Annotation: This section was recodified on September 11, 1997 from language originally codified in 1992 at 310 IAC 21-4-3.

Rule 5. Mineral Extractions

312 IAC 6-5-1 Applicability

Authority: IC 14-10-2-4; IC 14-28-1-5; IC 14-29-1-8

Affected: IC 14-34; IC 14-37

Sec. 1. (a) This rule establishes standards applicable to the extraction of sand, gravel, stone, or another mineral from or under the bed of a navigable waterway.

(b) Except as provided in subsections (c) through (d), this rule is administered by the division of water of the department.

(c) The division of reclamation of the department administers an activity under this rule that is also controlled by IC 14-34.

(d) The division of oil and gas of the department administers an activity under this rule that is also controlled by IC 14-37.

Annotation: The process for addressing the extraction of sand, gravel, or stone from the bed of a navigable waterway is codified by this rule. In addition, the rule seeks to harmonize agency administration of IC 13-2-4-9 (since recodified as IC 14-29-1-8) and IC 14-3-1-14.5 (since recodified as IC 14-29-3-1). Report of Public Hearing and Recommendation for Final Adoption of Amendments to the Navigable Waters Article (310 IAC 21), LSA Document #93-106(F) (Sep. 3, 1993). This section was codified as 310 IAC 21-5-1 in 1993 and recodified as 312 IAC 6-5-1 in 1997.

312 IAC 6-5-2 Procedures

Authority: IC 14-10-2-4; IC 14-29-1-8

Affected: IC 4-21.5; IC 14-11-4

Sec. 2. (a) Before the department takes an agency action to issue or deny a license under this rule, IC 14-11-4 and 312 IAC 2-3 govern.

(b) After the department takes an agency action, IC 4-21.5 and 312 IAC 3-1 govern.

Annotation: This section was codified as 310 IAC 21-5-2 in 1993 and recodified as 312 IAC 6-5-2 in 1997.

312 IAC 6-5-3 License to extract minerals

Authority: IC 14-10-2-4; IC 14-28-1-5; IC 14-29-1-8

Affected: IC 14-28-1; IC 14-29-1; IC 14-29-3; IC 14-34; IC 14-37

Sec. 3. (a) Except as provided in subsections (b) through (d), a written license is required under this rule before a person can lawfully extract sand, gravel, stone, coal, oil, gas, or another mineral from or under the bed of a navigable waterway.

(b) A separate license is not required under this rule for the extraction of coal from or under the bed of a navigable waterway if a license is issued under IC 14-34 and 310 IAC 12 that also applies the requirements of this rule.

(c) A separate license is not required under this rule for the extraction of oil or gas from or under the bed of a navigable waterway if a license is issued under IC 14-37 and 310 IAC 7 that also applies the requirements of this rule.

(d) A license is not required under this rule for the extraction of sand, gravel, or stone from the bed of a navigable waterway

that is within a floodway if the extraction activity is exempted or excluded from the licensing requirements of IC 14-28-1.

(e) A license under this rule shall conform to IC 14-29-1 and IC 14-29-3.

(f) The standards and requirements of this rule govern a license issued under this rule and any activity for which a license is required under this rule.

Annotation: This section was codified as 310 IAC 21-5-3 in 1993 and recodified as 312 IAC 6-5-3 in 1997.

312 IAC 6-5-4 License fees

Authority: IC 14-10-2-4; IC 14-28-1-5; IC 14-29-1-8; IC 14-34-2-1; IC 14-37-3-15

Affected: IC 14-34; IC 14-37

Sec. 4. (a) Except as provided in subsection (b), the fee for a license under this rule is fifty dollars (\$50).

(b) A separate license fee is not required under this rule for an activity for which a permit is issued under IC 14-34 or IC 14-37.

Annotation: This section was codified as 310 IAC 21-5-1 in 1993 and recodified as 312 IAC 6-5-1 in 1997.

312 IAC 6-5-5 Bonds

Authority: IC 14-10-2-4; IC 14-29-1-8; IC 14-34-2-1; IC 14-37-3-15

Affected: IC 14-34; IC 14-37

Sec. 5. (a) Except as provided in this section, a bond shall be posted by the license applicant with the department to assure prompt compliance with the terms and conditions of the license. Bond shall be in the form of a surety bond, a cash bond, or a certificate of deposit. No surety bond shall be approved unless issued by a company holding an applicable certificate of authority from the department of insurance, state of Indiana.

(b) The bond for any extraction resulting from surface coal mining operations shall be as determined under IC 14-34 and 310 IAC 12.

(c) The bond for any well for oil and gas purposes shall be as determined under IC 14-37 and 310 IAC 7.

Annotation: This section was codified as 310 IAC 21-5-5 in 1993 and recodified as 312 IAC 6-5-5 in 1997.

312 IAC 6-5-6 License duration

Authority: IC 14-10-2-4; IC 14-29-1-8; IC 14-34-2-1; IC 14-37-3-15

Affected: IC 14-37-4-10

Sec. 6. (a) Except as provided in subsection (b), a license issued under this rule, including a license for the extraction of coal, terminates upon the earlier of the following:

(1) The termination date set forth in the license.

(2) Five (5) years after the date on which the department sent notice of the agency action to issue the license.

(b) For the extraction of oil or gas, the duration of the license is as provided in IC 14-37-4-10 unless otherwise specified in the license.

Annotation: This rule section was originally codified at 310 IAC 21-5-6 to memorialize agency "traditions for addressing the extraction of oil, gas, and coal from beneath navigable waters." Report of Public Hearing and Recommendation for Final Adoption of Amendments to the Navigable Waters Article (310 IAC 21), LSA Document #93-106(F) (Sep. 3, 1993). The section was recodified as 312 IAC 6-5-6 on September 11, 1997.

312 IAC 6-5-7 Conditions for the extraction of minerals

Authority: IC 14-10-2-4; IC 14-29-1-8
Affected: IC 14-28-1; IC 14-34; IC 14-37

Sec. 7. The works, workings, and operations of a license issued under this rule must not do any of the following:

- (1) Impede or unreasonably impair the navigation of the navigable waterway.
- (2) Damage or endanger a bridge, highway, railroad, public work, or utility.
- (3) Damage the property of a riparian owner, an adjoining proprietor, or a person who holds a license under this rule and conducts mineral extraction on adjacent property. The department may waive the requirements of this subdivision if the license applicant obtains written consent from the affected person.
- (4) Cause significant harm to the environment.
- (5) Violate IC 14-28-1, IC 14-34, or IC 14-37.

Annotation: This section was codified as 310 IAC 21-5-7 in 1993 and recodified as 312 IAC 6-5-7 in 1997.

312 IAC 6-5-8 Compensation for extracted minerals

Authority: IC 14-10-2-4; IC 14-29-1-8
Affected: IC 13-11-2-116; IC 14

Sec. 8. (a) Except as provided in subsection (b), a person shall pay to the department a reasonable value for extracted minerals. The value shall be as determined by the department and set forth in the license.

(b) An extraction is exempt from subsection (a) if the mineral is authorized by the department for placement, and is lawfully placed:

- (1) for beach nourishment; or
- (2) in a landfill as defined in IC 13-11-2-116.

Annotation: This section was codified as 310 IAC 21-5-8 in 1993 and recodified as 312 IAC 6-5-8 in 1997.

Rule 6. General Authorization for Beach Nourishment to Lake Michigan

312 IAC 6-6-1 Applicability

Authority: IC 14-10-2-4; IC 14-29-1-8
Affected: IC 14-29-1

Sec. 1. (a) This rule establishes terms for a general authorization to place sand for beach nourishment within Indiana Dunes National Lakeshore or Indiana Dunes State Park.

(b) A person who acts under this rule is not required to complete an application or to obtain a written license from the department under IC 14-29-1. A person may, however, elect to seek a written license under IC 14-29-1 rather than apply this rule.

Annotation: This section was codified September 11, 1997. A similar general permit or authorization for beach nourishment was implemented by emergency rule on April 15, 1996 and expired on April 14, 1997. The text of the emergency rule was published at 19 Ind. Reg. 2316 (June 1, 1996).

This rule "would provide a 'general permit' for the placement of beach nourishment where materials to be placed do not include harmful contaminants and where the direct recipient is either the Indiana Dunes National Lakeshore or the Indiana Dunes State Park. The permitting process is not the primary impediment to placement of beach nourishment; lack of a regular funding source is. Yet access to a 'general permit' should help encourage the placement of beach nourishment when it is economically viable and environmentally sound." Report of Public Hearing, Analysis and Recommendation for Final Adoption, Recodification of the Rules Governing Navigable Waters, LSA #97-56(F) (June 9, 1997).

312 IAC 6-6-2 Notice to the department of natural resources

Authority: IC 14-10-2-4; IC 14-29-1-8

Affected: IC 14

Sec. 2. A person who wishes to obtain a general authorization under this rule must provide a written notice to the division of water of the department, including the following:

(1) The name, address, and telephone number of any person seeking the authorization. Persons for which the information shall be provided include:

(A) the owner of the sand before placement for beach nourishment; and

(B) if other than the owner, the person who transports the sand.

(2) The site, and the ownership of the site, from which sand will be removed or extracted.

(3) The results of any testing or other documentation to establish the sand is unlikely to contain contaminants harmful to humans or aquatic life.

(4) The method by which the sand is to be transported.

(5) The site where the sand is to be deposited for the purpose of providing beach nourishment and written acceptance of the riparian owner for its deposit.

(6) The period for which the general authorization is sought.

Annotation: This section was codified September 11, 1997. A similar general permit or authorization for beach nourishment was implemented by emergency rule on April 15, 1996 and expired on April 14, 1997. The text of the emergency rule was published at 19 Ind. Reg. 2316 (June 1, 1996).

312 IAC 6-6-3 Department project review

Authority: IC 14-10-2-4; IC 14-29-1-8

Affected: IC 14

Sec. 3. (a) Following the receipt of a written notice under section 2 of this rule, the department shall inspect the site from which the sand is to be extracted and the site at which the sand is to be deposited. Within fourteen (14) days after the receipt of the written notice, the department shall inform the person seeking the general authorization whether:

(1) the person may proceed;

(2) the person must comply with additional conditions in order to act under this rule, which general conditions may include successful completion of testing criteria; or

(3) the person cannot act except according to a license issued under IC 14-29-1-8.

(b) In performing its review, the department shall consider whether removal, transport, or placement of the sand is likely to pose a hazard to either of the following:

(1) Public health or safety.

(2) The environment.

(c) If the department does not respond within fourteen (14) days of the receipt of a written notice, the request for the general authorization is deemed to have been approved.

Annotation: This section was codified September 11, 1997. A similar general permit or authorization for beach nourishment was implemented by emergency rule on April 15, 1996 and expired on April 14, 1997. The text of the emergency rule was published at 19 IND. REG. 2316 (June 1, 1996).

312 IAC 6-6-4 Posting

Authority: IC 14-10-2-4; IC 14-29-1-8

Affected: IC 14

Sec. 4. The department may require a person who acts upon the general authorization to post a copy of the written notice, together with the acceptance and any terms or conditions required by the department, at the site where the sand is deposited.

Annotation: This section was codified September 11, 1997. A similar general permit or authorization for beach nourishment was implemented by emergency rule on April 15, 1996 and expired on April 14, 1997. The text of the emergency rule was published at 19 IND. REG. 2316 (June 1, 1996).

312 IAC 6-6-5 Compliance with terms and sanctions for violations

Authority: IC 14-10-2-4; IC 14-29-1-8

Affected: IC 14

Sec. 5. (a) A person who acts upon a general authorization must comply with the terms of the written notice provided under section 2 of this rule and any conditions under section 3 of this rule.

(b) A violation of subsection (a) may result in a revocation or suspension of the general authorization or in any other sanction provided by law for the violation of a license issued by the department.

Annotation: This section was codified September 11, 1997. A similar general permit or authorization for beach nourishment was implemented by emergency rule on April 15, 1996 and expired on April 14, 1997. The text of the emergency rule was published at 19 IND. REG. 2316 (June 1, 1996).